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Supreme Court, U.S.
FILED
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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

STUART GRAHAM

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. WHETHER THE DISTRICT COURT IMPROPERLY TOOK JUDICIAL NOTICE OF BAIL DOCUMENTS FOR THE SOLE PURPOSE FOR PERMITTING THE DISTRICT COURT TO COMPARE HANDWRITING TO PROVE PETITIONERS IDENTITY

NO._____

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Petitioner, Stuart Graham respectfully prays that a writ of certiorari issue to review the judgement of the United States Court of Appeals for the Ninth Circuit entered on December 10, 1999 (denial of petition for rehearing and October 12, 1999 (memorandum decision).

OPINION BELOW

On October 12, 1999 the Court of Appeals for the Ninth Circuit filed an unpublished memorandum decision in this appeal affirming Petitioner's conviction. A copy of the decision is attached to this petition as appendix "A".

JURISDICTION

On October 12, 1999 the Court of Appeals issued a memorandum decision and order affirming the district court's judgement and conviction. Petitioner Graham was convicted of one count of false statement in violation of Title 18 U.S.C. Section 1546.

On October 25, 1999 Petitioner timely filed a petition for rehearing and suggestion for rehearing en banc in the United States Court of Appeals for the Ninth Circuit. That petition was denied in an order of the Court of Appeals filed December 10, 1999 and attached to this petition as appendix "B".

The jurisdiction of this Honorable Court is invoked pursuant to the provisions of Title 28 U.S.C. Section 1254(1).

WHY GRANTING OF WRIT IS OF VITAL IMPORTANCE

Pursuant to Rules 10,12,14 and 16 of the Rules of the Supreme Court of the United States, this petition for writ of certiorari should be granted because the lower court misapplied constitutional law, ignored important decisions of this court with respect to the admission of evidence, resulting in the denial of important constitutional rights including the right to remain silent under Amendment V to the constitution and the right to bail under Amendment VIII.

STATUTORY PROVISIONS INVOLVED IN THIS CASE

Title 18 U.S.C. Section 1546:

(a) Whoever knowingly forges, counterfeits, alters, or falsely makes any immigrant or nonimmigrant visa, permit, border crossing card, alien registration receipt card, or other document prescribed by statute or regulation for entry into or as evidence of authorized stay or employment in the United States, or utters, uses, attempts to use, possesses, obtains, accepts, or receives such visa permit, border crossing card, alien registration card, or other document prescribed by

statute or regulation for entry into or as evidence of authorized stay or employment in the United States, knowing it to be forged, counterfeited, altered, or falsely made, or to have been procured by means of any false claim or statement, or to have been otherwise procured by fraud or unlawfully obtained; or

Whoever, except under direction of the Attorney General or the Commissioner of the Immigration and Naturalization Service, or other proper officer, knowingly possesses any blank permit, or engraves, sells, brings into the United states, or has in his control or possession any plate in the likeness of a plate designed for the printing of permits, or makes any print, photograph, or impression in the likeness of any immigrant or nonimmigrant visa, permit or other document required for entry into the United States, or has in his possession a distinctive paper which has been adopted by the Attorney General or the Commissioner of the Immigration and Naturalization Service for the printing of such visas, permits, or documents; or

Whoever, when applying for an immigrant or nonimmigrant visa, permit, or other document required for entry into the United

States, or for admission to the United States personates another, or falsely appears in the name of a deceased individual, or evades or attempts to evade the immigration laws by appearing under an assumed or fictitious name without disclosing his true identity, or sells or otherwise disposes of, or offers to sell or otherwise dispose of, or utters, such visa, permit, or other document, to any person not authorized by law to receive such document; or

Whoever knowingly makes under oath, or as permitted under penalty of perjury under section 1746 of Title 28, United States Code, knowingly subscribes as true, any false statement with respect to a material fact in any application, affidavit, or other document required by the immigration laws or regulations prescribed thereunder, or knowingly presents any such application, affidavit, or other document which contains any such false statement or which fails to contain any reasonable basis in law or fact-

Shall be fined under this title or imprisoned not more than 25 years (if the offense was committed to facilitate an act of international terrorism (as defined in section 2331 of this title)), 20 years (if the

offense was committed to facilitate a drug trafficking crime (as defined in section 929(a)of this title)), 10 years (in the case of the first or second such offense, if the offense was not committed to facility such an act of international terrorism or a drug trafficking crime), or 15 years (in the case of any other offense), or both.

(b) Whoever uses- (1) an identification document, knowing (or having reason to know) that the document was not issued lawfully for the use of the possessor, (2) an identification document knowing (or having reason to know) that the document is false, or (3) a false attestation, for the purpose of satisfying a requirement of section 274A(b) of the Immigration and Nationality Act, shall be fined under this title, imprisoned not more than 5 years, or both.

(c) This section does not prohibit any lawfully authorized investigative, protective, or intelligence activity or a law enforcement agency of the United States, a State, or a subdivision of a State, or of an intelligence agency of the United States, or any activity authorized under title V of the Organized Crime Control Act of 1970 (18 U.S.C. note prec. 3481). For purposes of this section, the term "State" means

a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States.

STATEMENT OF THE CASE

On January 8, 1998 a warrant was issued for Appellant GRAHAM's arrest based upon a three count complaint filed in the United States District Court charging use of false document in violation of Title 18 U.S.C. 1546. Appellant GRAHAM was arrested on January 16, 1998 at his place of business in La Jolla, California. The Court ordered GRAHAM released that day on a personal surety bond, however, due to an immigration hold placed by the Department of Justice, United States Immigration and Naturalization Service [INS], Appellant GRAHAM was not released until January 20, 1998 after posting a bond with the INS.[1] On March 18, 1998 a two Count Indictment was returned against Appellant GRAHAM

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1 Appellant GRAHAM faces collateral proceedings in the nature of deportation and removal hearings before the United States Immigration and Naturalization Service based upon his conviction for this "aggravated felony". See, Title 8 U.S.C. 1101 et.seq.

charging him with two counts of false statements with respect to material fact in violation of Title 18 U.S.C. 1546. These counts charge specifically that on July 20, 1994, GRAHAM, then an alien, did knowingly and willfully make, under oath, a false statement with respect to a material fact in an application required by the immigration laws in violation of Title 18 U.S.C. 1546. Count two charges that on or about April 7, 1997, Appellant GRAHAM made a false statement with respect to a material fact in an application required by immigration laws in violation of Title 18 U.S.C. 1546.

On September 2, 1998 trial was held before the District Court sitting without a jury. After hearing evidence, the District Court entered judgement of acquittal as to count one and convicted Appellant GRAHAM of count two. [RT Trial 70-72][2]

On December 14, 1998, after probation hearing and

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[2] RT Trial refers to the Reporters Transcript of Proceedings held on September 2, 1998.

sentencing, the Court imposed a two year term of supervised probation, requiring completion of one hundred fifty (150) hours community service within eighteen (18) months; payment of a one thousand dollar ($1000) fine; and one hundred dollar ($100) penalty assessment. [RT Sentencing 8-12] The appeal followed.

STATEMENT OF FACT RELEVANT TO THIS PETITION

In June, 1997 the Federal Bureau of Investigation [FBI] asked for the assistance of the criminal investigative division of the INS in reviewing the immigration file of STUART GRAHAM. [RT Trial 8-9] INS Special Agent Luis Ruiz testified at trial that he was not the case agent who examined GRAHAM's immigration file for the FBI. [RT Trial 7-9; 30-32] Agent Ruiz testified that he reviewed the subject immigration file prior to trial and determined that on August 11, 1994 GRAHAM had initiated a change of status procedure by filing documents with the INS seeking conditional resident alien status

as the husband of a United States Citizen in an application for alien relative. [RT Trial 32-37] The government sought to introduce documents filed in support of that application to prove GRAHAM made materially false statements in connection with his INS application. [RT Trial 15,20,26,28,51, 55-59]

Ruiz testified that in the August 11, 1994 filing Mr. GRAHAM denied he intended to practice polygamy in the United States and that he had no former wife. [RT Trial 14-18] On April 7, 1997 a second filing was made with the INS seeking to remove conditions on permanent residency based upon the length of his current marriage. [RT Trial 24-28] Agent Ruiz explained that in a petition for alien relative based upon a marriage of less than two years duration a conditional resident alien status is approved for a period of two years and thereafter the applicant must seek to remove the conditions on residence. [RT Trial 40-41] From his review of GRAHAM's immigration file, it appeared that such an application was filed on April 7,

1997 and thereafter approved on April 29, 1997 making GRAHAM a permanent lawful resident alien.[RT Trial 40-44] Agent Ruiz explained that in the April, 1997 application GRAHAM failed to list his children. [RT Trial 29-30] [ECR 34-35]

Agent Ruiz asserted that each of these statements was false and material with respect to the applications then pending before the INS.[RT Trial 16-18;23;27-28] GRAHAM objected to the introduction documents from the immigration file on the basis that they contained hearsay for which no exception existed and that there was no proper showing of either the identity of the applicant or the materiality of the statements. Those objections were overruled and the exhibits received in evidence.[RT Trial 13-14; 20-22; 26-28]

Agent Ruiz explained that the adjustment of status process is complex and that these applications were prepared and filed by an attorney on GRAHAM's behalf. [RT Trial 34-35]

Ruiz said adjudication of the petitions in the immigration file he reviewed would have been reviewed, inspected, and probably subject to a face-to-face interview prior to approval. [RT Trial 35-36] Ruiz did not know if such a meeting or an investigation took place.[RT Trial 36]

From information in the immigration file RUIZ examined it appeared GRAHAM arrived in the United States October 29, 1991; and his permission to reside in the United States as a visitor expired on April 29, 1992. Thereafter, GRAHAM was married to United States Citizen Patricia Russell on August 10, 1993. GRAHAM's application to become a Resident Alien based upon his marriage to United States Citizen was filed one year later on August 11, 1994 and approved nine months after on May 4, 1995. [RT Trial 36-38]

Agent Ruiz explained that the purpose of the petitions in this immigration file and the questions contained therein was to demonstrate a bona fide relationship between the two individuals

making the application on behalf of the alien.[RT Trial 43-44] In this case, GRAHAM was illegally in the United States [out of status] for approximately twenty-eight months prior to the filing of the first petition. [RT Trial 36-37; 45]

Over GRAHAM's objection, the government sought to introduce documents from Great Britain and Northern Ireland notarized by the Vice Counsel of the United States of America at London, England; pursuant to the provisions of Federal rule of Evidence 902. [RT Trial 51-57] Those documents related to GRAHAM's purported marriage in Northern Ireland; the birth of four children; death of one, and a Decree Nisi relative to the marriage. Finally, the government sought the introduction of a stipulation and order to modify conditions of bail prepared by GRAHAM's counsel; signed by all parties and filed in the United States District Court for the Southern District of California on April 13, 1998. This document was admitted over GRAHAM's objection under the provisions of Federal Rule of Evidence 201,

so the Court would have before it what was purported to be the Defendant's signature. [RT Trial 51-54]

The District Court found the Defendant guilty on Count two based on the "unique signature" on Exhibit 8 in comparison with the apparently known (not proven) handwriting appearing in the Court file on Exhibit 12 to show that the same STUART GRAHAM did in fact have children as alleged in the allegedly false statement which forms the basis for count two of the Indictment. The Court did not have evidence of GRAHAM's signature to compare with the allegation that he had been previously married as alleged in Count One of the Indictment and, for that reason, found Appellant not guilty of Count One. [RT Trial 69-71] [ECR 74-76]

REASONS FOR GRANTING THIS WRIT

A. PETITIONER WAS DENIED DUE PROCESS OF LAW BY THE DISTRICT COURT WHEN IT TOOK JUDICIAL NOTICE OF COURT DOCUMENTS FILED IN SUPPORT OF A MODIFICATION OF BAIL CONDITIONS FOR THE SOLE PURPOSE OF PERMITTING THE COURT TO THEN ACT AS A WITNESS TO COMPARE HANDWRITING TO PROVE PETITIONER'S IDENTITY

The government sought to admit Exhibit 12 [ECR 99-100] under Federal Rules of Evidence Section 201(b) so that the Court would have the purported known signature of the defendant to compare with foreign documents admitted pursuant to Federal Rule of Evidence 902. This procedure was improper for two reasons. First, the court took judicial notice of documents that were not necessarily "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Second, Exhibit 12 was admitted so

the court could become a witness by comparing the purported known signature of Petitioner with documents produced from the foreign government. Making the district court a witness permitted the government to argue that the defendant was properly identified by his signature only. Other independent means were available to the government, even through the witness called. By employing this procedure, the District Court became a witness in violation of Federal Rule of Evidence 605.

Federal Rule of Evidence 201(b) provides:

> A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Federal Rules of Evidence, 201, 28 U.S.C.

Federal Rule of Evidence 605 provides:

> The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point. Federal Rules of Evidence 605, 28 U.S.C.

In its notes on Rule 201 the advisory committee warned

that with respect to judicial notice of adjudicative facts, the tradition has been one of caution in requiring the matter be beyond reasonable controversy. The tradition of circumspection appears to be soundly based and no reason to depart from it is apparent.

Proof of the defendant's identity is a major linchpin to the proof against the accused. Here, the government sought to introduce the accused's pleadings in the District Court as evidence of his identity based upon his "unique signature". In order to prevail, the District Court became a witness to compare the purportedly known signature with signatures appearing in foreign documents. Noted by the advisory committee on proposed rules are the comments of Professor Davis:

> The reason we use trial-type procedure, I think is that we make the practical judgement, on the basis of experience, that taking evidence, subject to cross-examination and rebuttal is the best way to resolve controversy involving disputes of adjudicative facts, that is, facts pertaining to the parties. The reason we require a determination on the record is that we think that a fair procedure in resolving disputes of adjudicative facts calls

> for giving each party a chance to meet in the appropriate fashion the facts that come to the tribunal?s attention, and the appropriate fashion for meeting disputed adjudicative facts includes rebuttal evidence, cross-examination, usually confrontation, and argument (either written or oral or both). The key to a fair trial is the opportunity to use the appropriate weapons (rebuttal evidence, cross-examination, and argument) to meet adverse materials that come to the tribunal's attention." A System of Judicial Notice Based on Fairness and Convenience, in Perspectives of Law 69, 93 (1964).
>
> The rule proceeds upon the theory that these considerations call for dispensing with traditional methods of proof only in clear cases. Professor Davis concludes that judicial notice should be a matter of convenience, subject to requirements of procedural fairness. Id., 94

In this case, the trial judge became a witness on an issue that is not so clearly settled. Handwriting expert testimony and analysis is frequently admitted as evidence to assist the trier of fact in resolving the identity of alleged perpetrators and/or accomplices. In some cases, however, the parties have the sought to present evidence from witnesses critical of handwriting analysis to rebut the conclusion found by so called expert witnesses. See, United States v. Velasquez, 64 F. 3d 844

(3rd Cir. 1995) (court should have allowed into evidence proffered expert testimony critical of handwriting analysis. See also, State v. Harris, 839 SW 2nd 54 (1992) Tenn.; cert denied, 507 U.S. 954.

The admission of Exhibit 12 as the purported signature of the defendant poses two major problems. First, a defendant putting the government to its burden proof at trial becomes an unwilling witness against himself when he files pleadings in the District Court seeking to exercise his right to bail. This not only implicates the accused's right to remain silent under the Fifth Amendment, but also creates an impermissible chilling effect on the exercise of his constitutional right to bail under the Eight Amendment. Second, it is not so clear that the accuracy of Exhibit 12 cannot be reasonably questioned. Indeed, in United States v. Judge, 846 F.2d 274 (5th Cir. 1988) cert. denied 495 U.S. 918, the Court of Appeals when invited to take judicial notice of certain Drug Enforcement Administration regulations

declined to do so under Federal Rule of Evidence 201(b); it was not a part of the original record sent by the District Court, and judicial notice of a particular fact or facts as a basis for fact fi perhaps most salient, the government selectively reprinted portions of the DEA Manual which selective printing does not give the Petitioner an adequate opportunity to a challenge the applicability and administration of those provisions. Likewise, here, the request to admit documents from the District Court file without notice to Petitioner, eliminated the possibility of rebuttal evidence with respect to the accuracy of the purportedly known signature and the field of signature and handwriting analysis.

A matter is a proper subject of judicial notice only if it is well known, established and authoritatively settled. This includes facts which are capable of immediate and accurate determination by resort to easily accessible sources of "indisputable accuracy". Such facts may be considered without first being proven. Government of Virgin Islands v. Gereau,

523 F.2d 140 (1975), cert. denied 424 U.S. 917. Fairness and due process under the Fourteenth Amendment to the United States Constitution requires that when a court is contemplating accepting nding, notice must be afforded to the parties who will be affected by the taking of such notice. Eidt v. City of Nachez, Mississippi, 421 SO. 2d. 1225 (1982). Petitioner received no notice of the government's eleventh hour request to receive bail documents from his district court file.

The proper procedure for compelling the production of an accused's handwriting is by noticed pretrial motion whereby an order is sought directing the accused to submit a handwriting exemplar to a qualified expert witness. That procedure was not employed here. Had it been, the accused would have been on notice, could have had an opportunity to object and could have obtained rebuttal evidence regarding the reliability of handwriting analysis as was proffered in United States v. Velasquez, 64 F.3d 844 (Third Cir, 1995).

The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. Mathews v. Eldridge, 424 U.S. 319, 333 (1976).

The more critical the issue is to a case, the more reluctant the Court should be to determine it in any way by taking judicial notice. Trans World Airlines, Inc. v. Hughes, 308 F. Supp. 679 DCNY (1969); modified on other grounds, 495 F.2d 51, reversed on other grounds, 409 U.S. 363, rehearing denied, 410 U.S. 975, on remand 359 F. Supp. 783. In this case, the admission of Exhibit 12 for the sole purpose of supplying the court with Appellant's purportedly known signature executed in support of his application to expand the conditions of his bail and purportedly, although not conclusively proven, to be signed by the accused is precisely what is referred to in the Trans World decision. The critical issue of a criminal defendant's identity should not be determined in any way by judicial notice. Here, we have twin evils of judicial notice

providing the evidence from which the Court could then determine, in its capacity as a witness, to be uniquely similar to the signature appearing on foreign documents which form the basis for the finding of guilt as to Count Two. The only reason the accused was not also found guilty of Count One is that the Court did not have a signature among the foreign documents to compare with the judicially noticed bail application which purported to bear the accused's signature.

CONCLUSION

For these reasons this Court should grant this writ of certiorari.

The writ should issue.

Respectfully submitted,

April 10, 2000

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
DEC 1 0 1999
CATHY A. CATTERSON, CLERK
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	
	)	No. 99-50024
Plaintiff-Appellee,	)	
	)	D.C.No.CR-98-00844-K
v.	)	
	)	
STUART GRAHAM,	)	ORDER
	)	
Defendant-Appellant.	)	
	)	

Before: RYMER and McKEOWN, Circuit Judges, and SHEA*, District Judge.

The panel has voted to deny appellant's Petition for rehearing en banc and Judge Shea so Recommends.

The full court has been advised of the petition for rehearing en banc and no active judge has has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and petition for rehearing en banc are DENIED.

*Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.

Stuart Graham appeals his conviction following a bench trial for knowingly making a false statement on an Immigration and Naturalization Service document in violation of 18 U.S.C. § 1546. We have jurisdiction pursuant to 28 U.S.C. § 1291 and we affirm.

I

The district court did not err when it took judicial notice of the Stipulation and Order to Modify Conditions of Release contained in the district court file for signature comparison. See United States v. Wilson, 631 F.2d 118, 119 (9th Cir. 1980); Desimone v. United States, 227 F.2d 864, 867 (9th Cir. 1955). Nor did comparing signatures violate Federal Rule of Evidence 605, because the judge was properly acting as fact-finder, not witness. See United States v. Woodson, 526 F.2d 550, 551 (9th Cir. 1975); see also 28 U.S.C. § 1731; Fed. R. Evid. 901(b)(3). Notice would have made no difference, as Graham's counsel conceded that the document was genuine. Furthermore, Graham's Fifth Amendment rights were not violated because handwriting samples

are not protected by the privilege against self-incrimination. See United States v. Euge, 444 U.S. 707, 718 (1980); Gilbert v. California, 388 U.S. 263, 266-67 (1967); Schmerber v. California, 384 U.S. 757, 761 (1966).[1]

II

There was sufficient evidence to identify Graham and sustain a § 1546 conviction. Graham's counsel introduced him at trial as "Stuart Graham" and conceded that Exhibit 12 bore his client's signature. Exhibit 3 (I-751 Petition to Remove the Conditions of Residence), signed by a "Stuart Graham," noted that Graham had no children, and a "Stuart Graham" signed Exhibit 8 (birth certificate) indicating that Graham was the father of Luke Graham. The signatures on both Exhibits 3 and 8 are almost indistinguishable from the signature on Exhibit 12, a court document. As the district court pointed out, Graham's signature is quite unique. Viewing the

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[1] Graham's contention that the district court's judicial notice of Exhibit 12 also violated his Eighth Amendment rights is not supported by argument and is therefore waived. See Entertainment Research Group, Inc. v. Genesis Creative Group, Inc., 122 F.3d 1211, 1217 (9th Cir. 1997), cert. denied, 118 S.Ct. 1302 (1998).

evidence in the light most favorable to the prosecution, the government established beyond a reasonable doubt that the same Stuart Graham who appeared before the district court committed a §1546 perjury violation by knowingly making the false statement on his I-751 INS form that he had no children, when in fact he had at least one, and that this misrepresentation was of a material fact.

AFFIRMED.

APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
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U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,	)	
	)	No. 99-50024
Plaintiff-Appellee,	)	
	)	D.C.No.CR-98-00844-K
v.	)	
	)	
STUART GRAHAM,	)	MEMORANDUM*
	)	
Defendant-Appellant.	)	
	)	

Appeal from the United States District Court
for the Southern District of California
Judith N. Keep, Presiding

Submitted October 6, 1999**
Pasadena, California

Before: RYMER and McKEOWN, Circuit Judges, and SHEA:*** District Judge.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

** The panel unanimously finds this case suitable for decision without oral argument. Fed.R. App.P. 34(a)(2).

*** Honorable Edward F. Shea, United States District Judge for the Eastern District of Washington, sitting by designation.